No. _____

IN THE

Supreme Court of the United States

IN RE CHRYSLER LLC,
Debtors,

INDIANA PENSIONERS, INDIANA STATE TEACHERS RETIREMENT FUND,
Petitioners,

v.

CHRYSLER LLC, *ET AL.*,
Respondents.

In Opposition to Application for a Stay Pending Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' OPPOSITION TO APPLICATION FOR A STAY PENDING WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents disclose as follows:

Debtor Chrysler LLC is a Delaware Limited Liability Company. CarCo Intermediate HoldCo II LLC holds 100% of the membership interest in Chrysler LLC. As set forth in more detail below, Chrysler LLC holds, either directly or indirectly, 100% of the ownership interest in all of the remaining debtors.

Chrysler LLC directly holds 100% of the ownership interest in the following debtors: Chrysler Aviation Inc., TPF Asset, LLC, TPF Note, LLC, Chrysler Institute of Engineering, Chrysler International Services S.A., Chrysler Motors LLC, Utility Assets LLC, Chrysler International Corporation (USA), Chrysler Service Contracts Inc., Chrysler Transport Inc., Dealer Capital Inc., DCC 929, Inc., and Peapod Mobility LLC.

Chrysler Motors LLC holds 100% of the ownership interest in the following debtors: Chrysler Realty Company LLC, Chrysler Vans LLC, Global Electric Motorcars, LLC, and Chrysler Dutch Holding, LLC.

Chrysler International Corporation (USA) holds 100% of the ownership interest in debtor Chrysler International Limited, LLC.

Chrysler Service Contracts Inc. holds 100% of the ownership interest in debtor Chrysler Service Contracts of Florida, Inc.

Chrysler International Services S.A. holds 100% of the ownership interest in debtor Chrysler Technologies Middle East Ltd.

Global Electric Motorcars, LLC holds 100% of the ownership interest in debtors NEV Mobile Service, LLC and NEV Service, LLC.

Chrysler Dutch Holding, LLC holds 100% of the ownership interest in debtor Chrysler Dutch Investment, LLC.

CNI CV holds 100% of the ownership interest in debtor Chrysler Dutch Operating Group, LLC.

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Respondents-appellees Chrysler LLC *et al.* respectfully submit this opposition to the application for a stay by the petitioners-appellants Indiana Pension Funds of a judgment by the United States Court of Appeals for the Second Circuit, entered on June 5, 2009, pending disposition of the Funds' not-yet-filed certiorari petition.

INTRODUCTION

The Indiana Funds, Maria Pasquale, and the Ad Hoc Committee of Consumer Victims of Chrysler are seeking a stay that, if it were granted, would effectively decide the merits of an issue on which a total of four judges – including a three-judge panel presided over by Chief Judge Jacobs—have unanimously rejected their positions after going to extraordinary lengths to give these petitioners a three-day hearing and then complete plenary appellate review and accompanying motion practice in a total of just nine days. Petitioners bury this fact in their applications, but, in light of Chrysler's fragile state and daily erosion of value, ***Fiat S.p.A. has set a deadline of June 15, 2009 for the sale*** of Chrysler's assets to New CarCo Acquisition LLC, a new entity formed by Fiat. Accordingly, unless this Court were to decide the Funds' not-yet-filed petition for certiorari and then, in the unlikely event that their petition were granted, order briefing completed and proceed to decide the merits before June 15, the sale will not happen and the petitioners, who have already lost in both the Bankruptcy Court and in the Second Circuit, will have effectively prevailed on their meritless objections to the sale.

This impossible schedule demanded by the Funds' application is reason alone to deny it, especially in light of the presumption of correctness that attaches to the lower court's order.[1] But the applicants have also not made any of the other showings required to obtain a stay. Indeed, they cannot show any injury at all in the absence of a stay—let alone an irreparable one. The Funds hold just 0.61% of $6.9 billion in debt under Chrysler's senior secured credit facility. If the sale goes forward as ordered by the Bankruptcy Court and the Second Circuit, New CarCo Acquisition will pay Chrysler $2 billion and the proceeds from the sale will be distributed *pro rata* to the lenders under this First Lien Credit Agreement – with the Funds receiving $12.2 million (on a distressed investment that they acquired for $17 million). Critically, notwithstanding two years of exhaustive effort by Chrysler to find a buyer and a bidding auction in the Bankruptcy Court, ***there is no other bidder for Chrysler's assets*** and, as the Bankruptcy Court expressly found, the only other viable alternative for Chrysler is to proceed with a liquidation that will return ***no more than $800 million*** for all constituents.

These are the only two choices Chrysler has. As Chief Judge Jacobs aptly put it to the Funds' counsel at oral argument, "You can't wait for a better deal to come

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[1] *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers) (denying a stay and applying the principle that "the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant" is "presumptively correct"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 17.19, at 798 (9th ed. 2009) (noting the "concern that to grant a stay would effectively be to determine the case on the merits"); *Montgomery v. Jefferson*, 468 U.S. 1313, 1314 (1984) (Marshall, J., in chambers) (denying stay where, "[g]iven the little time left for evaluating . . . the questions raised by the application, I am not persuaded to interfere with the actions of the Second Circuit").

in from Studdebaker." *See* http://www.nytimes.com/2009/06/06/business/06 chrysler.html? (as reported in New York Times, June 5, 2009, "Appeals Court Refuses to Block Chrysler Sale"). Accordingly, if Chrysler is forced into liquidation by a stay that will kill the sale, the Funds will suffer no additional loss. By contrast, a stay would impose devastating injury on Chrysler and its stakeholders (including other lenders under the $6.9 billion facility), employees, suppliers, and the public interest at large. In monetary terms alone, the record shows that the loss to Chrysler and its stakeholders will be more than $1.2 billion (*i.e.*, the difference between the $2 billion proceeds from the sale and the, at most, $800 million in cash from a liquidation) – value that will not be recovered if the sale does not happen by June 15 and Chrysler is instead forced to liquidate due to lack of funding to continue as a going concern. The additional losses to Chrysler's dealers, lessors, workforce, and suppliers that have been selected by New CarCo Acquisition and assigned to as part of the purchased assets would add to that already devastating loss.

The calamitous impact of imposing the stay requested by petitioners would also, in all likelihood, be to no avail to petitioners. The Funds try to make it appear that the Bankruptcy Court invoked a novel procedure to authorize the sale of Chrysler's assets before confirmation of a plan of reorganization. But the Bankruptcy Code and long-established precedent expressly provides for this procedure where, as here, it is necessary to preserve the going-concern value of the enterprise and is effected without undermining the protections of the plan process.

Here, the Bankruptcy Court made careful findings—which have been unanimously affirmed—establishing that the use of this well-established sale procedure was authorized here. And, after careful review of the proposed sale agreement—including review of the designations by New CarCo Acquisition of the contracts to be assumed and assigned to it and cured at its expense—the Court determined that the proposed sale does not effect any distribution of Chrysler's property or violate the priority scheme established by the Bankruptcy Code. There is nothing in the Bankruptcy Court's fact-intensive analysis or the Second Circuit's affirmance on clear-error review that either warrants review by this Court or, in the unlikely event that certiorari were granted, would lead to a reversal.

The petitioners have had all of the process to which they are entitled while the lower courts have worked diligently to decide their objections in a timely fashion to allow for the proposed Fiat Sale to stay on track. Petitioners should not be permitted to use the extraordinary remedy of a stay, pending the unlikely prospect of any further, discretionary review in this Court or any change in the ultimate result here, to unravel what the lower courts have ordered, stop the sale of Chrysler's assets and force the company into liquidation, and cause massive harm to Chrysler and the public interest.

BACKGROUND

The Debtors commenced these cases to implement a prompt sale of most of their operating assets that will preserve Chrysler's business as a going concern under new ownership and maximize the Debtors' recovery for the benefit of their creditors. Section 363 of the Bankruptcy Code expressly authorizes this procedure

and provides that, after notice and a hearing, a trustee or debtor-in-possession "may use, sell, or lease, other than in the ordinary course of business property of the estate." 11 U.S.C. § 363(b).

To that end, the Debtors, Fiat and New CarCo Acquisition have entered into an agreement under which (a) the Debtors will sell most of their operating assets to New CarCo Acquisition in exchange for $2 billion in cash; and (b) Fiat will contribute state-of-the-art small car and other technology and expertise, as well as its global distribution and purchasing network to New CarCo Acquisition. This transaction is hereafter referred to as the Fiat Sale. (JA1801-02.) In addition, New CarCo Acquisition has reviewed Chrysler's leases and executory contracts, including its supply chain contracts, its dealer agreements and its collective bargaining agreement with the United Auto Workers, and decided in its business judgment which to assume based upon the future benefit they will confer on New CarCo Acquisition (thereby relieving Chrysler of billions of dollars of liability). (JA3226.)

The Fiat Sale is financially backed by the U.S. Department of the Treasury and Export Development Canada, an affiliate of the Canadian Government, which together are providing New CarCo Acquisition with almost $7 billion in an acquisition finance facility. (JA2349-2374.) In addition the U.S. Treasury and Export Development Canada provided $4.9 billion of debtor-in-possession financing (the "DIP Loan"), largely to bridge Chrysler's continuing losses until a sale is consummated. (JA2375.) The DIP Loan has a series of milestones which tie its

continuing availability to achieving progress with regard to the Fiat Sale. (JA2375-2511.) It also provides funding after the sale to allow for the orderly wind down of Chrysler's remaining assets, including eight factories and discontinued car lines, which remain subject to the lien securing the First Lien Credit Agreement, described below.

On May 3, 2009, the Debtors filed a motion seeking approval to consummate the Fiat Sale or a similar transaction with some other interested bidder. In connection with that motion, the Debtors, after two days of hearings, obtained the Bankruptcy Court's approval of a bidding procedure on May 7. Despite widespread publicity regarding Chrysler's situation, the only bid received was the offer of New CarCo Acquisition to enter into the Fiat Sale. (Stay App. 27a.)

The Bankruptcy Court conducted a three-day hearing on the sale motion from May 27-29, 2009. (Stay Opp. App. 12a.) At that hearing and the bidding procedures hearing that preceded it, the Debtors presented testimony from 16 witnesses and introduced 48 exhibits into evidence. As the Bankruptcy Court found, the Debtors' evidence established that: (i) the Fiat Sale is the product of sound business judgment (Stay App. 25a.), (ii) the Debtors have received the consent to the sale from the Collateral Trustee (Stay App. 11a-12a), who holds the first lien on the assets that secure Chrysler's repayment obligations to the lenders, including the Funds, that are parties to the Amended and Restated First Lien Credit Agreement, dated November 29, 2007 (JA2512-2681), provided that the cash proceeds of the Fiat Sale are distributed to the lenders under the First Lien Credit

Agreement, (iii) despite exhaustive efforts the Fiat Sale is the only alternative to immediate liquidation that the Debtors have, (SPA17-19, SPA33-34) and (iv) the $2 billion purchase price is fair, provides more than market value and far exceeds the value the Debtors (and the Lenders) will realize if the Fiat Sale is not consummated. (SPA17-19, 21.) The evidence also showed that, in light of the ongoing deterioration of the Debtors' assets, any material delay in closing the Fiat Sale will likely kill it—depriving the Debtors, their stakeholders and the country of its substantial benefits. (SPA175.)

The Funds did not call a single witness. They submitted no fact or expert testimony regarding the value of the Debtors' assets or the fairness of the Fiat Sale. They adduced no evidence that there was any other transaction available, let alone one that might yield more than $2 billion for the Debtors.

From this evidentiary record, the Bankruptcy Court made the detailed factual findings that lie at the heart of this case, including:

- "The Debtors have demonstrated . . . good, sufficient and sound business purposes and justifications for the immediate approval of the . . . [Fiat Sale]." (Stay App. 25a.)

- "Currently, the Debtors are losing over $100 million dollars per day." "Unless the [Fiat Sale] is approved without delay, the Debtors' assets will continue to erode, and they will be forced to liquidate in the near term." (*Id.*)

- There are "compelling circumstances for the approval of the . . . [Fiat Sale] outside of the ordinary course of the Debtors' business pursuant to section 363(b) of the Bankruptcy Code prior to, and outside of, a plan of reorganization in that, among other things, the Debtors' estates will suffer immediate and irreparable harm if the relief requested in the Sale Motion is not granted on an expedited basis." (*Id.*)

- "[T]ime is of the essence in (a) consummating the Fiat Sale, (b) preserving the viability of the Debtors' businesses as going concerns and (c) minimizing the widespread and adverse economic consequences for the Debtors' estates, their creditors, employees, retirees, the automotive industry and the broader economy that would be threatened by protracted proceedings in these chapter 11 cases." (Stay App. 25a-26a.)

- "The consummation of the [Fiat Sale] outside of a plan of reorganization pursuant to the Purchase Agreement neither impermissibly restructures the rights of the Debtors' creditors nor impermissibly dictates the terms of a liquidating plan of reorganization for the Debtors. (Stay App. 26a.)

- "[T]he consideration provided for in the Purchase Agreement constitutes the highest or otherwise best offer for the Purchased Assets and provides fair and reasonable consideration for the Purchased Assets." (Sale App. 26a-28a.)

- "[T]he [Fiat Sale] is the only alternative to liquidation available to the Debtors." (Stay App. 28a.)

- "[T]he [Fiat Sale] will provide a greater recovery for the Debtors' creditors than would be provided by any other practical available alternative, including, without limitation, liquidation whether under chapter 11 or chapter 7 of the Bankruptcy Code." (*Id.*)

- "In light of the need to grant the relief requested in the Sale Motion on an expedited basis to avoid any erosion in the going concern value of the Purchased Assets, a reasonable opportunity to object or be heard with respect to the Sale Motion and the relief requested therein has been afforded to all interested persons and entities . . . ." (Stay App. 31a.)

- "The Debtors may sell the Purchased Assets free and clear of all Claims because, in each case where a Claim is not an Assumed Liability, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code have been satisfied." (Stay App. 35a.)

The Funds filed a notice of appeal from the Bankruptcy Court's order, and the Debtors promptly moved in the Bankruptcy Court for an order certifying the

orders for immediate appeal to the United States Court of Appeals for the Second Circuit. The Bankruptcy Court granted the Debtors' motion, and, on June 2, 2009, the Second Circuit thereafter accepted the appeal pursuant to 28 U.S.C. § 158(d) and stayed the Bankruptcy Court's orders. (Stay App. 70a-73a.) In light of the imminence of a June 15, 2009 date by which the Fiat Sale must close (JA1809-10; JA3277), the Second Circuit ordered submission of all appeal briefs by noon on June 4 and oral argument starting at 2:00 p.m. the next day. (Stay App. 72a.) The Court heard argument for nearly three hours and then, after the panel adjourned to conference, Chief Judge Jacobs read an order from the bench affirming the Bankruptcy Court's orders for substantially the reasons stated in the Bankruptcy Court's decisions and stating that the Court's opinion (or opinions) "will issue in due course." The mandate issued with the Court's order on June 5. (Stay App. 74a.) And the Court further ruled that the stay it had ordered on June 2 would continue until the earlier of 4:00 p.m. on June 8, 2009 or the time at which an application for a stay is denied by the U.S. Supreme Court. (*Id.*)

The Funds submitted this application for a stay just before midnight on June 6. The Funds have not filed a petition for certiorari, nor did they state in their application when they intend to file one.

REASONS FOR DENYING THE APPLICATION FOR A STAY

I. THE FUNDS HAVE NOT MADE ANY OF THE REQUISITE SHOWINGS TO WARRANT THE EXTRAORDINARY RELIEF OF A STAY

A stay pending the Court's decision on a petition for certiorari is an "extraordinary" remedy that can be obtained "only if a four-part showing is made."

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). The applicant must show both a "reasonable probability" that the Court will grant certiorari, *id.*, and a "significant possibility of reversal of the lower court's decision." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Even apart from the likelihood of a grant and ultimate reversal, the applicant is also required to make threshold showings of irreparable injury in the absence of a stay and, upon balancing the equities, that any injury to the applicant is outweighed by the injury to the opposing party and the public interest. *See Rostker*, 448 U.S. at 1308; STERN & GRESSMAN, § 17.19, at 788.

The Funds cannot make any one of these four showings here.

A. The Funds Cannot Show Irreparable Harm in the Absence of a Stay

First, the Fund's application should be denied on the sole ground that it will not be irreparably harmed—or, indeed, harmed at all—in the absence of a stay. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury in the absence of a stay."); *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, C.J., in chambers) ("An applicant for stay first must show irreparable harm if a stay is denied."); *see also* STERN & GRESSMAN § 17.19(a), at 789 ("A Justice considering an application for a stay is likely to first examine the motion papers to see whether denial of the stay would work an irreparable injury on the applicant. If it does not, that may in itself be sufficient grounds for denying the application.").

The Bankruptcy Court made proper findings, well-supported by proof after the three-day hearing and not overturned on clear-error review by the Second Circuit, that the liquidation value of Chrysler is no greater than $800 million—far less than the cash value to Chrysler from the $2 billion sale of substantially all of its assets—that no bidder other than Fiat came forward to purchase Chrysler's assets, and that the Fiat Sale is the only viable alternative other than immediate liquidation of the company. (Stay App. 27a-29a; JA1742; JA2943-2926.) Accordingly, *even if* the Court were to (i) grant Indiana's as-yet-to-be-filed petition for certiorari, and (ii) reverse the Second Circuit's judgment, all of the First Lien Lenders, including the Funds, will be far worse off than if the sale were to occur as authorized by the Bankruptcy Court's order. (Stay App. 27a-29a.) If the sale does not go forward, there will be $800 million or less to distribute to the Funds and Chrysler's other creditors, while, if the Court does not enter any further stay and the sale does go forward as authorized by the lower courts, the Funds and the other First Tier Lenders will share *pro rata* distributions of the $2 billion proceeds from the sale.

The Funds, thus, cannot show any harm to them if a stay is denied. Tellingly, the Funds devote their argument on irreparable injury to a purported procedural "harm" that will befall them by virtue of the sale making their petition for certiorari moot. (Stay Motion at 25.) But there is of course no right to review in this Court, and the Second Circuit has already gone to extraordinary lengths to decide the Funds' appeal as of right in less than a week. Meanwhile, the Funds do

not even try to show that they will suffer from any *actual harm*, let alone irreparable harm, if the Court denies their application. Their counsel wrote in the Introduction to the Funds' application that, without a stay, there will be "economic harm measured in the millions of dollars to the Indiana Pensioners." (*Id.* at 3.) But these are just words on a page, and there is not a shred of *proof* in the record to support this assertion.

Moreover, even though the Funds cannot claim any harm stemming from the Fiat Sale as compared to the alternative of liquidating Chrysler, to the extent they have any injury at all it is readily compensable in damages – and thus not irreparable. The Administrative Agent, at the instruction of lenders holding more than 90% of the $6.9 billion debt under the First Lien Agreement, caused the Collateral Trustee to consent to the Fiat Sale in exchange for $2 billion in cash. (JA3117-3124.) That action was, as the Bankruptcy Court held, required by the terms of the First Lien Agreement to which the Funds are a signatory. (JA2512-2681.) If the Funds believe the Administrative Agent's action was not authorized, however, they may seek recovery against it for breach of contract. Such recovery would either be measured by the difference between the face-value of the Funds' $42 million investment and the $12.2 million the Funds will receive upon completion of the Fiat Sale, or, more realistically, a far lesser amount. The Funds do not mention this in their motion, but they provided their *consent* to a $2.5 billion sale. (JA3183-3196.) Their *pro rata* distribution in that event would have been approximately $13.5 million, or $1.5 million more than under the actual terms of

the Fiat Sale. (*Id.*) Accordingly, if the Funds believe the Administrative Agent damaged them by consenting to a $2 billion sale, they can simply seek recovery of this $1.5 million as against the Administrative Agent.

There is not, however, any basis for the Court to effectively stop the $2 billion Fiat Sale due to any "harm" that the Funds claim they have suffered due to the Administrative Agent's conduct. For this reason alone, the Funds' application for a stay should be denied.

B. Chrysler, Its Creditors, Employees, and the Public Interest, on the Other Hand, Will Be Irreparably Injured by a Stay That Will, In Practical Effect, Kill Chrysler's Business As a Going Concern

While the Funds cannot show any irreparable harm in the absence of a stay, Chrysler, its stakeholders – including other lenders – and the public interest will suffer immense harm by a stay that will, in practical effect, kill the Fiat Sale and lead to a liquidation that, *even the Funds acknowledge*, will harm the Funds and Chrysler's creditors. On a straightforward balancing of the harms here, the Funds have not shown any damage to them if the Fiat Sale goes forward, while a stay threatens more than $1.2 billion in direct damages to Chrysler and still further and immense harm, as detailed below, to the public interest. *See* STERN & GRESSMAN, § 17.19 at 788 ("At the least, the injury to the applicant if no stay is granted must outweigh the injury to the opposing party or others (including the members of the public) if the stay is granted.").

As the Bankruptcy Court found, the Fiat Sale is the lone alternative that will preserve the going-concern value of the Debtors' assets and allow the Debtors to realize some of that value. (JA62-64.) New CarCo Acquisition, as the beneficiary of

valuable contributions from Fiat and the competitive cost structure assured by the terms of the collective bargaining agreement with the United Auto Workers, has convinced lenders to commit approximately $7 billion in financing to acquire Chrysler's operating assets. (JA2327; JA2349.) Chrysler has limited financing to proceed with a liquidation and up to $1.9 billion in financing to cover its losses and bridge the Fiat Sale. (JA2375.) That bridge support is expressly conditioned on the Fiat Sale proceeding promptly, with Fiat, as a matter of business judgment, setting the date for closing as no later than June 15, 2009. (JA1809-10; JA3277.)

The failure to consummate the Fiat Sale will result in the immediate, piecemeal liquidation of Chrysler's assets in a distressed market—a scenario that would impose enormous harm on Chrysler and its constituencies. (JA997-1005; JA1935.) The Court will not, however, decide the Funds' yet-to-be-filed petition for certiorari and—in the unlikely event that such a petition were to be granted—reach the merits of the Second Circuit's judgment before next week. Accordingly, any further stay in this matter beyond the stays already imposed by the Bankruptcy Court and the Second Circuit to facilitate their review will end the prospect of the Fiat Sale and subject Chrysler to a liquidation in which it and its creditors, *including the Funds*, will realize far less value from Chrysler's estate.

Indeed, even a stay of only a few days would impose significant harm on Chrysler. As the evidence before the Bankruptcy Court showed, Chrysler is forced to spend $100 million *each day* the closing of the Fiat Sale is delayed—a daily figure that dwarfs the speculative and unproven losses that the Funds assert they will

suffer as the holders of loans having a face amount of $42 million. (JA1446-1447; JA2910.) That delay impairs Chrysler's ability to obtain the highest and best value for its assets. There is simply no way to enter any stay here that does not impose great harm on Chrysler and its stakeholders.

Further still, it is not just the company itself that hangs in the balance; the broader public interest is implicated as well. The immediate liquidation that would result if the Fiat Sale collapses would have a devastating impact on Chrysler's employees and retirees, on communities around the country, and on the economy as a whole. Of Chrysler's 55,000 current employees, 38,500 are in the United States. As of the commencement of these bankruptcy proceedings, Chrysler had 32 manufacturing and assembly facilities, 23 of which are located in the United States, and 24 parts depots worldwide, including 20 in this country. (JA2980-82; SPA2-3.) Chrysler has some 1,300 suppliers and an expansive network of more than 3,200 dealers in the United States. (JA2957-58; Stay App. 3a.)

A liquidation instead of going forward with the Fiat Sale would mean the immediate loss of 38,500 Chrysler jobs in the United States. Chrysler's thousands of workers and retirees would forfeit $9.8 billion of health care and other benefits and $2 billion in annual pension payments. All 23 of Chrysler's manufacturing facilities and 20 parts depots in the United States would shut down, as well as 18 additional plants and parts depots worldwide. Chrysler's 3,200 dealers would also be put out of business and the 140,000 employees of those dealerships would lose their jobs. Further still, auto parts and service supplier invoices will lose a critical

operating customer and consequent source of contract revenue, which likely would shut down hundreds of suppliers and eliminate several hundred thousand more jobs. (JA2974-75.)

And not only Chrysler is at risk. According to the Center for Automotive Research ("CAR"), if at least one of the three major American automakers fails in 2009, the United States economy could lose nearly 2.5 million jobs this year—239,341 at Chrysler, GM, and Ford—795,371 supplier/indirect jobs, and over 1.4 million other jobs.[2] The effect in those cities where the automotive industry is centered (the Great Lakes region and the Southern U.S.) would be particularly devastating. But the effect will not be localized. If the industry collapses, CAR estimates that during the first three years following the collapse, $65 billion in personal income taxes and $55 billion of social security receipts will be lost. (JA2974-75.)

It is difficult to overstate the problems a liquidation would create for families, schools and communities around the country. Tax revenues would plunge while social service resources would strain to meet the public's needs. These are precisely the systemic adverse economic consequences that chapter 11 is intended to prevent, by providing a debtor with the tools to preserve its business as a going concern. *See* 7 Collier on Bankruptcy ¶ 1100.01 ("Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate[, which] can save the

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[2] David Cole & Sean McAlinden & Kristin Dziczek & Debra Maranger, *CAR Research Memorandum: The Impact on the U.S. Economy of a Major Contraction of the Detroit Three Automakers*, Center for Automotive Research, Nov. 4, 2008.

jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business.").

In similar contexts, courts have recognized the breadth of the public interest that may be at stake. In the *TWA* bankruptcy, for example, the court denied a request to stay a sale order pursuant to § 363 of the Bankruptcy Code, explaining:

> [T]here is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American. This includes the preservation of jobs for TWA's 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale. . . . [T]he Sale Order implements the public interest that favors an organized rehabilitation (albeit here as only a part of a larger viable enterprise) of a financially distressed corporation which lies at the core of chapter 11. I conclude that the alternative to the Sale Order in this case is a free-fall chapter 11 leading to a liquidation with the subsequent substantial disruption of diverse economic relationships and likelihood of material adverse harm to a very broad spectrum of creditor constituencies.

In re Trans World Airlines, Inc., No. 01-00056, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001).

The public interest at stake here also goes far beyond that in *TWA*. *See In re Chrysler*, 2009 WL 1507547, at *9 (where the Bankruptcy Court found that "because of the overriding concern of the U.S. and Canadian governments to *protect the public interest*, the terms of the Fiat Sale present an opportunity that the marketplace alone could not offer") (emphasis added); *see also id.* at *17 ("The Governmental Entities have made the determination that it is in their respective national interests to save the automobile industry").

In sum, because a further stay of the Bankruptcy Court's Sale Order pending this Court's disposition of a certiorari petition that the Funds have not yet filed will inflict substantial and irreparable harm to Chrysler, its stakeholders, and the public interest at large—and, in the absence of a stay, the Funds will not suffer *any* harm—the Funds' stay application should be denied.

C. The Funds Have Not Shown That There Is a Reasonable Probability That Certiorari Will Be Granted

Apart from the threshold grounds for denying a stay upon a balance-of-harms analysis, the Funds have also not shown either that there is a reasonable probability that the Court will grant certiorari in this matter or that, if it were to grant the writ, that the Court would ultimately reverse the Second Circuit's judgment affirming the Stay Order.

1. The Sale Order Poses Fact-Intensive Issues That Were Affirmed by the Second Circuit on Clear-Error Review

A stay is typically denied where, as here, the lower court's order turns on fact-intensive issues already resolved against the applicant.[3]

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[3] *See Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers) (denying application and expressing "reluctance, in considering in-chambers stay applications, to substitute my view for that of other courts that are closer to the relevant factual considerations that so often are critical to the proper resolution of these questions"); *Board of Ed. of City School Dist. of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) (Brennan, J., in chambers) (denying application for stay because "the question which the petitioners claim is presented by the case . . . could be before this Court only if the Court overturned the factual findings concurred in by the two lower courts" and "[t]he petitioners have not suggested substantial reasons for believing that these findings would be held to be clearly erroneous"); *Block v. North Side Lumber Co.*, 473 U.S. 1307, 1307 (1985) (Rehnquist, C.J., in chambers) (denying application for a stay where the applicant "furnished [] no basis for disturbing [the lower courts'] conclusion in this highly factual issue"); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory*

The Bankruptcy Court's decision in support of the Stay Order was predicated on a fact-intensive analysis under a multi-factor test used to determine whether, pursuant to § 363 of the Bankruptcy Code, a debtor "may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363. The Second Circuit's judgment, in turn, was rendered after conducting a deferential clear-error review of the Bankruptcy Court's findings. Specifically, after conducting a three-day hearing, the Bankruptcy Court found that there was the requisite "good business reason" under the applicable standard to grant the Debtors' motion for the Sale Order and supported that determination with detailed findings, including that

- "the Fiat Transaction is the only option that is currently viable";
- "the only other alternative is the immediate liquidation of the company" and "[a]ny material delay would result in substantial costs";
- the procedures used to determine which contracts would be assumed and assigned was "a reasonable exercise of the Debtors' business judgment"; and
- "the $2 billion New Chrysler is paying for the Debtors' assets exceeds the value that the First-Lien Lenders [including the Funds] could recover in an immediate liquidation."

Stay Opp. App. 17a-19a. The Bankruptcy Court's additional rulings that (i) the sale may be made free and clear of all liens pursuant to § 363(f) of the Bankruptcy Code

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Agency Procedures, 409 U.S. 1207, 1218 (1972) (Burger, J., in chambers) ("The criteria for granting a stay of the judgment of such a district court are stringent, at least when the necessity for a stay turns upon a refined factual evaluation of its effect."); *cf. Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923) (Taft, C.J.) ("It is clear that the Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter.").

because the Funds consented to the Fiat Sale, and (ii) New CarCo Acquisition is a "good faith purchaser" in accordance with § 363(m) of the Code, are similarly supported by findings and detailed determinations based on the evidence adduced at the three-day hearing. (Stay App. 30a-31a; JA3117; JA3183.)

There is no "reasonable probability" that the Court will grant certiorari and review the Second Circuit's judgment affirming, on clear-error review, these and other findings by the Bankruptcy Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Indeed, in this case and others, the inquiry as to whether a § 363 sale of substantially all of a debtors' assets outside a plan should be permitted is a very fact-intensive application of the statutory language and long-established precedent, and, notwithstanding several petitions, this Court has never granted certiorari to review the propriety of an asset sale pursuant to § 363 of the Bankruptcy Code.[1] *See also* STERN & GRESSMAN, § 17.19(b), at 794 n.71 (noting that such concerns warrant

[1] *See White v. Collins*, *cert. denied*, 128 S.Ct. 1707 (2008) (denying certiorari in case approving non-plan sale of debtor assets under Sections 363(b) and 363(f)); *In re UAL Corp.*, 443 F.3d 565 (7th Cir. 2006), *cert. denied*, 127 S.Ct. 189 (2006) (approval of agreement under Section 363(b)(1)); *FutureSource, LLC v. Reuters Ltd.*, 312 F.3d 281 (7th Cir. 2002), *cert. denied*, 538 U.S. 962 (2003) (free and clear sale of debtor's assets under Section 363(f)); *In re Hurt*, No. 00-15088, 2001 WL 615282 (9th Cir. June 5, 2001), *cert. denied*, 122 S.Ct. 921 (2001) (approved sale of debtor properties under § 363(b)); *In re Rickel Home Centers, Inc.*, 209 F.3d 291 (3d Cir. 2000), *cert. denied* 121 S.Ct. 175 (2000) (debtor-in-possession's sale of shopping mall leases under Sections 363, 365(a) and 365(f)); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1251 (1997) (free-and-clear sale of successor liabilities pursuant to Sections 363 and 365); *Rodriguez v. Urban Brands*, 167 P.R. Dec. 509 (P.R. 2006), *cert. denied*, 549 U.S. 1113 (2007) (sale of assets to affiliate under Section 363(f)).

denial of a stay application); *S. Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1303-04 (1981) (Powell, J., in chambers).

The Funds try to make it appear as if the Bankruptcy Court invoked some unprecedented procedure to permit Chrysler to sell its assets before confirming a plan of reorganization. That is simply not true. As Justice Breyer has recently noted: "[O]ne major reason why a transfer may take place before rather than after a plan is confirmed is that the preconfirmation bankruptcy process takes time. . . . And a firm (or its assets) may have more value (say, as a going concern) where sale takes place quickly. . . . Thus, an immediate sale can often make more revenue available to creditors or for reorganization of the remaining assets." *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2330 n.2 (2008) (Breyer, J., dissenting on a different issue—whether, under § 1146(a) of the Bankruptcy Code, a tax-stamp exemption could be granted in conjunction with a § 363 sale). That case was one of many examples of courts approving asset sales outside the normal plan process to preserve the going-concern value of the debtor's business.[5]

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[5] *See, e.g., In re Decora Indus., Inc.*, No. 00-4459, 2002 WL 32332749, at *3 (D. Del. May 20, 2002) (approving 363(f) sale of substantially all assets of chapter 11 debtor that had no source of future financing: "Debtors have two alternatives: (1) proceed with the Proposed Transaction, or (2) terminate business operations, employees and commence a liquidation of assets. . . . All parties agree that an asset sale, as opposed to liquidation, will provide more money to the estate to satisfy the creditors' claims, as well as maintaining the going concern value of Debtors. . . ."); *In re Med. Software Solutions*, 286 B.R. 131, 141 (Bankr. D. Utah 2002) (court approved sale of essentially all of debtor's assets at outset of chapter 11 case); *In re Naron & Wagner, Chartered*, 88 B.R. 85, 90 (Bankr. D. Md. 1988) (approving sale of operating subsidiary where purchase price exceeded its estimated liquidation value and "failure to close the sale quickly will likely result in a halt of [subsidiary]'s continuous operations. If [subsidiary] cannot be sold as a going concern, there will

That is precisely why the Bankruptcy Court approved the sale here. On the basis of well-supported findings that are not clearly erroneous, the Court determined that Chrysler would provide more value to its creditors ($2 billion) if the Fiat Sale takes place now than under the only other viable alternative for the company pursuant to which no other bidder would step forward to purchase the company's assets and Chrysler would thus be forced to liquidate for far less value (from $0 to, at most, $800 million) as part of the bankruptcy plan process. (Stay App. 27a-29a; JA1742-43; JA1747-48; JA1935; JA2926-43.)

None of the issues that the Funds say they will raise in their certiorari petition changes this analysis. The Funds contend that "the First Lien Lenders' claims are properly valued at $6.9 billion." (Stay Motion at 18.) But this is sheer speculation that the Bankruptcy Court did not adopt, and for good reason. After Chrysler spent nearly two years literally spanning the globe trying to find a buyer and then, upon filing for bankruptcy, the Bankruptcy Court adopted a procedure after giving notice and an opportunity to be heard whereby buyers other than Fiat could step forward and bid against Fiat, *no other bidder stepped forward with any offer* let alone one anywhere close to the range of $6.9 billion.

The Funds also falsely treat New CarCo Acquisition as the Debtors as a predicate for their arguments that "Chrysler" is improperly making distributions to subordinated creditors in circumvention of the plan process or effecting a "reorganization" with the Fiat Sale. (*See* Stay Motion at 7). Again, this cannot be

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be a substantial decrease in its value to the Debtor's estate.").

squared with the record. New CarCo Acquisition is not a debtor, and it is not distributing the Debtors' property outside the context of bankruptcy. The Debtors' property is the $2 billion in cash that they will receive from the Fiat Sale and *all of that amount is going to the First Lien Lenders*, including the Funds, in complete compliance with the Bankruptcy Code's principles of priority of liens. (JA2287-2303; JA3117; JA3125; JA3183.) After the Fiat Sale, New CarCo Acquisition will sell vehicles manufactured at *its* plants and by *its* employees. (JA2287-2303.) New CarCo Acquisition's property will not be the Debtors' property. There will be, simply, no distribution of the Debtors' property by New CarCo Acquisition, who will have purchased certain bargained-for assets of the Debtor assets as a going concern in exchange for $2 billion that, as collateral proceeds, will be subject to the attachment of the lien securing the First Lien Credit Agreement and distributed to the Lenders. (*Id.*)

For all of these reasons, the Bankruptcy Court's order does not present any issues on which the Court would be likely to grant certiorari, but only fact-intensive issues that have been properly affirmed by the Second Circuit on its clear-error review.

2. The Court Is Unlikely to Grant Cert. on Any Issues Concerning the Source of the Funding for the Sale

The Funds also state that they will ask the Court to review the lower court's treatment of whether the U.S. Treasury may use money from the Troubled Asset Relief Program, or TARP, to fund the Fiat Sale. But, for several reasons, this case

is not a good vehicle for addressing the issues that the Funds say they will present in their certiorari petition.

First, while the Funds have challenged whether the Government may use TARP funds for the sale, that issue is poorly presented by this case. As Chief Judge Jacobs pointed out at oral argument before the Second Circuit, what the Funds actually want is for the Government to use *more* TARP money to fund the Fiat Sale. The Funds have made quite clear that they do not want Chrysler to be liquidated. (A1698-99, where the Funds' counsel denied that they want a liquidation and stated "we want to capture more of the value associated with our collateral. . . . We have no problem with the sale.") And because, as the Bankruptcy Court found, "the only other alternative [to the Fiat Sale] is the immediate liquidation of the company," the Funds' real complaint amounts to that the Government should be paying *more* to fund the Fiat Sale which would, in turn, provide more money to the lenders, such as the Funds, under the First Lien Credit Agreement. As the Bankruptcy Court summarized this problem with the Funds' argument:

> [T]he Indiana Funds argue that the U.S. Treasury acted unlawfully by providing TARP funds to the Debtors and New Chrysler, but premise most of their other arguments and development of the record by maintaining that more TARP funds should have gone to them. In essence, their position is that the U.S. Treasury's alleged unlawful acts did not benefit them enough; therefore, they object.

(Stay Opp. App. 35a, n.23). In this posture, where the Funds have an interest concerning the use of TARP funds that is—at bottom—not adverse to the Debtors, New CarCo Acquisition, Fiat, the UAW, or the governments of the United States and Canada, the Court is unlikely to review the "issue" that the Funds have raised

concerning TARP funds. *Cf. Flast v. Cohen*, 392 U.S. 83, 100-01 (1968) ("[T]he question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

Second, as the Bankruptcy Court also held, the Funds do not have standing to challenge the Government's use of TARP funds. *See Bailey v. Patterson*, 368 U.S. 346, 346-47 (1961) (per curium) (denying motion for a stay where, "[i]n addition to the considerations normally attending an application for such relief, a serious question of standing is presented on this motion"). The Funds ignore this significant vehicle problem in their application, notwithstanding that it was the subject of exhaustive briefing before the Second Circuit and the Bankruptcy Court. But the Funds cannot show any injury in fact properly traceable to the government, because, as the Bankruptcy Court held, the Funds have *consented to* the Fiat Sale under the express terms of the First Lien Credit Agreement. (Stay Opp. App. 25a – 27a.) *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 228 (2003) (stating plaintiffs "cannot show that their alleged injury is 'fairly traceable'" to the statute at issue because their alleged inability to compete stems not from the operation of the statute, "but from their own . . . personal choice"). Further, due to the government's agreement to fund the Fiat Sale, the lenders under the First Lien Credit Agreement are receiving a *premium*. The Funds cannot establish that the government has caused them any "injury" by the use of TARP funds when, without the government's

agreement to fund the Fiat Sale, the Funds would be much worse off under a liquidation scenario. Nor can the Funds establish the third prong of standing—redressability by a favorable decision—as the Government's obligation to fund the Fiat Sale is *not* tied to TARP funds.

Third, even if the Funds could overcome this significant standing problem, the statutory scheme does not permit them to challenge the Treasury Secretary's authority under TARP in order to block a sale in a bankruptcy court—as they tried to do here. The Treasury Secretary's actions pursuant to the Emergency Economic Stabilization Act of 2008, which established TARP, are subject to judicial review pursuant to the procedures set forth in the Administrative Procedure Act, under which, as EESA expressly notes, any challenge to agency action is subject to deferential "arbitrary and capricious" review in federal court. 12 U.S.C. 5229(a)(1).

The Funds did not bring an administrative challenge to the Treasury Secretary's use of TARP funds in connection with the Fiat Sale. Instead, they first raised their challenge to the Secretary's authority in an attempt to block the sale of Chrysler's assets in the Bankruptcy Court. EESA expressly provides, however, that, "other than to remedy a violation of the Constitution," a federal court may not enter an injunction "or other form of equitable relief" against the Secretary for, *inter alia*, making commitments to purchase with TARP funds. *See* 12 U.S.C. § 5229(a)(2)(A) (providing that this ban on injunctions applies to the Secretary's action pursuant to, *inter alia*, § 5211 of EESA, which provides the authority for establishing TARP). The Funds contended that they fit within the exception to this

provision because the use of TARP funds somehow effects an unconstitutional "taking" of "property" under the Fifth Amendment. But, as the Funds conceded at oral argument in the Second Circuit—and as the Bankruptcy Court expressly held—the Funds are claiming violation of a *contractual right* to the distribution of certain proceeds from execution on a lien. The Funds do *not* hold the lien under the First Lien Credit Agreement, and thus do not have any property right under this agreement that can be "taken" by the federal government within the meaning of the Fifth Amendment. *See United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) (drawing distinction between "the contractual right of a secured creditor to obtain repayment of his debt," modification of which does *not* give rise to a takings claim, and the "property right of the same creditor in the collateral" (i.e., the lien), modification of which could).

Finally, even putting to one side these myriad vehicle problems, the putative issue of statutory construction that the Funds raise concerning the statutory definition of a "financial institution" is not one that would warrant review by the Court. As discussed in more detail directly below, the Funds do not even have a colorable argument under the plain language of EESA. Moreover, at a bare minimum, the Court would not likely grant certiorari to review this issue in the absence of even a *single decision* by a court of appeals addressing it—let alone a circuit split. *See* STERN & GRESSMAN, § 4.3, at 229.

For all of these reasons, the issues that the Funds say they intend to raise in their certiorari petition regarding the Treasury Secretary's use of TARP funds are

not reasonably likely to be reviewed by the Court and do not warrant the extraordinary remedy of a stay.

D. There Is Not a Significant Probability that a Majority of the Court Will Determine That the Second Circuit's Judgment Is Erroneous

Finally, the Funds have not shown there is a significant probability that, *if* the Court were to grant their forthcoming petition for certiorari, the Court would ultimately determine that the Second Circuit's judgment is erroneous.

As stated above, the Court is unlikely to disturb the Bankruptcy Court's fact finding and the Second Circuit's affirmance, on clear-error review, of those findings. Nor does the Bankruptcy Court's application of legal rules present issues that are likely to be reviewed in this Court or, if reviewed, result in a reversal of the Second Circuit's judgment. The Bankruptcy Court made its detailed findings upon the application of well-established principles of law. The Funds' contentions to the contrary are based on a mischaracterization of the record before the Bankruptcy Court and speculation that is unsupported by any actual proof.

As to the TARP issue raised by the Funds, not only do all of the vehicle problems above – including the Funds' lack of standing – likely pose an insurmountable barrier to obtaining review in this Court. But the Funds are simply wrong on the merits that the Secretary lacks authority to use TARP funds in connection with the Fiat Sale. The Funds claim that Chrysler does not meet the definition of a "financial institution" under EESA and that, therefore, the Treasury Secretary was not permitted to use TARP funds in connection with the Fiat Sale. But, although this is the first so-called "precise legal issue" that the Funds contend

is cert.-worthy, they conspicuously never cite the actual statutory language in their application. (Stay Motion at 14.) The term "financial institution" is a term of art in EESA, however. It is defined broadly in the statute to include *any institution* established and regulated under the laws of the federal government or the states:

> The term "financial institution" means *any institution, including, but not limited to*, any bank, savings association, credit union, security broker or dealer, or insurance company, *established and regulated under the laws of the United States or any State*, territory, or possession of the United States . . . and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.

12 U.S.C. § 5202(5). Chrysler and all of the Debtors readily meet the plain language of this definition: they are institutions established under the laws of various states and are also regulated, quite extensively, under the laws of the federal government and the states.

The Funds go on at some length in their application about statements by individual legislators and the Secretary of the Treasury concerning EESA and its breadth, but they never even try to explain why, under the plain language of the statute that Congress actually enacted, Chrysler and the Debtors do not fit within the broad definition of "financial institutions" in EESA. Especially in light of all of the threshold vehicle issues discussed above that are likely to warrant denial of certiorari or preclude consideration of the merits of this statutory construction issue, there is not a significant probability that the Court will ultimately reverse the lower courts' determination.

II. IN THE ALTERNATIVE, THE STAY SHOULD BE DENIED BECAUSE THE FUNDS HAVE NOT OFFERED TO POST AN ADEQUATE BOND

Not only have the Funds failed to establish any of the requirements for obtaining a stay, but they have also *entirely ignored* the issue of an adequate bond to protect the Debtors. The Funds hold approximately $42 million of first-lien claims and are seeking to recover some unspecified, unproved, and wholly speculative amount in excess of the $12.2 million they will receive if the Fiat Sale goes forward as approved by the Bankruptcy Court and the Second Circuit. The Funds should not be permitted to kill a $2 billion sale of Chrysler's assets—and force a liquidation of the company that will result in more than a billion dollars of losses—without posting a bond to protect Chrysler and its stakeholders in the very likely event that either their forthcoming certiorari petition is denied or, if granted, the Second Circuit's judgment is affirmed.

Under 21 U.S.C. 2101(f), the Court may condition a stay on the posting of a bond that will answer for "all damages" caused by reason of a stay:

> The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be condition on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ [of certiorari] with the period allotted therefore, or fails to obtain an order granting the application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

See also Sup. Ct. R. 23.4. In accordance with this rule, Justices deciding stay applications routinely condition the granting of a stay on the posting of an adequate bond.[6]

The Funds, however, never even mention in their motion posting an adequate bond to protect Chrysler and its stakeholders against the enormous harm to them if a stay is granted and the Court either does not grant certiorari or, if it does, ultimately affirms the Second Circuit's judgment. As noted, if a stay in this Court were to stop the sale and force a liquidation of Chrysler, the damages to Chrysler and its stakeholders will be, at least, ***$1.2 billion*** – a figure that does not even include damages caused by the loss of jobs and related losses in the supplier and other industries that would be affected by what would be, in these circumstances, a devastating liquidation of the company.

While the Funds' application for a stay should be denied for all of the reasons set forth above, even assuming that a stay were to be entered here it should thus be conditioned on the Funds posting a bond in at least the amount of $1.2 billion to protect Chrysler against damages that would be caused by a stay. *See In re Calpine Corp.*, No. 05-60200, 2008 WL 207841, at * 6-7 (Bankr. S.D.N.Y. Jan. 24, 2008) (requiring bond of $900 million to cover "aggregate additional interest expense the

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[6] *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 548 U.S. 936, 936 (2006) (per curium); *Modjeski & Masters v. Carter*, 485 U.S. 1031, 1031 (1988) (White, J., in chambers); *Brewick & Co. v United States*, 75 S. Ct. 912, 915 (1955) (Harlan, J., in chambers) (requiring a bond of the "greatest possible exposure to loss pending appeal" after expressing concern with "whether the [opponents to the stay application] can be adequately indemnified against [] damage pending appeal").

Debtors could suffer if they were unable to close their existing exit financing"); *ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 347 (S.D.N.Y 2007) (requiring supersedeas bond of $1.3 billion).

The Funds have already had their appeal as of right, and the Second Circuit went to extraordinary lengths to permit that appeal without threatening to disrupt the sale of substantially all of Chrysler's assets before the drop-dead date of June 15, 2009. If they are to be permitted any further discretionary process in addition to that which they have already been afforded as of right by the Second Circuit and the Bankruptcy Court, they should be required to post an adequate bond to protect Chrysler and its stakeholders against the damage that will very likely ensue if a stay were granted here.

III. THE BANKRUPTCY COURT'S APPROVAL OF THE DEBTORS' ASSETS FREE AND CLEAR OF TORT CLAIMS DOES NOT WARRANTS REVIEW

The tort claimants also seek a stay pending review of their petition for certiorari. As with the Funds, however, the tort claimants cannot show irreparable injury and have not presented any issues on which the Court is likely to grant certiorari or, if it did, to reverse.

Any present and future tort claimants are not in any worse position than they would be if Chrysler were liquidated.[7] As with the Funds, the tort claimants

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[7] While New Chrysler has agreed to assume certain pre-existing liabilities of the Debtors specified in Section 2.08 of the Purchase Agreement, including liabilities for product warranties, product returns and rebates on vehicles sold by the Debtors, the Purchase Agreement provides in Section 2.09 that the assets being purchased exclude "all Product Liability Claims arising from the sale of Products or Inventory prior to the Closing" and "all Liabilities in strict liability, negligence, gross negligence or recklessness for acts or omission arising prior to or ongoing at

therefore cannot show any irreparable harm in the absence of a stay. Whether Chrysler is liquidated or the Fiat Sale goes forward – the only two viable choices facing Chrysler – the fact is that no general unsecured creditors, including tort claimants, are likely to receive any money because there are secured creditors ahead of them with billions of dollars in unmet claims.

The Court is also not likely to grant review on this issue. Under Section 363(f) of the Bankruptcy Code, a court may order that a sale of assets is free and clear of all "interests in property." Although that phrase is not defined in the Code, the Bankruptcy Court correctly concluded that it extends beyond *in rem* interests such as liens to encompass *in personam* claims, including tort claims. (*See* SPA 42-13.) That conclusion is consistent with this Court's precedent, and there is also no circuit split on the issue.

The bankruptcy court properly followed the Third Circuit's reasoning in *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003) ("*TWA*"), which "makes clear that such tort claims are interests in property such that they are extinguished by a free and clear sale under section 363(f)(5) and are therefore extinguished by the Sale Transaction." (SPA 42) (citing *TWA*, 322 F.3d at 289). There is no other decision from another court of appeals that takes the opposite view. Moreover, the narrow reading of § 363 urged by the tort claimants flies in the face of a clear "trend [in the courts] . . . toward a more expansive reading of 'interests in property' which

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the Closing." The term "Product Liability Claim" is expansively defined in the Definitions Addendum to the Purchase Agreement.

'encompasses other obligations that may flow from ownership of the property.'" *TWA*, 322 F.3d at 289 (quoting 3 COLLIER ON BANKRUPTCY 363.06[1]).[8]

Nor is there any likelihood that the tort claimants could persuade this Court that the Bankruptcy Court's analysis is wrong. Indeed, if the claims at issue were to attach to the assets in the hands of New CarCo Acquisition, as the tort claimants content they should, then they must be "interests in property" within the meaning of § 363(f). Given the complete absence of overlapping equity ownership between Chrysler and New CarCo Acquisition, there is no basis other than New CarCo Acquisition's ownership of those assets on which to hold it liable for tort claims allegedly arising from Chrysler's conduct. That is why the Bankruptcy Court was correct in holding that such tort claims are "extinguished by the Sale Transaction." (SPA 12.)

The Bankruptcy Court also properly overruled objections to the Fiat Sale from consumer advocacy groups on the ground that future tort claimants were not given adequate notice. Here again, the Court is not likely to review the lower court's application of notice principles to the specific facts of the notice given here. The notice of the proposed sale was published in newspapers with very wide circulation – such as *USA Today*, *The Wall Street Journal* and *The New York*

[8] The tort claimants' reliance Section 1141(c) of the Bankruptcy Code to argue that interests in property must exclude tort claims is misplaced. That provision, which refers to "creditor[s], equity security holder[s], and . . . general partners in the debtor," uses the term "claims" to distinguish between the interests of creditors, on the one hand, and those of equity security holders and general partners, on the other hand, whose interests ordinarily cannot be properly described as "claims." Section 363(f), in contrast, refers to "any interest property," subsuming claims that are connected to the assets being sold.

Times, as well as the U.S., European and Asian editions of *Automotive News* and *The Financial Times*. (Stay App. 24a.) It expressly stated in paragraph 1 that the Debtors were seeking authority to sell substantially all of their assets to Purchaser "free and clear of all liens, claims, interests and encumbrances." As this Court has held—and the Bankruptcy Court acknowledged—such publication notice is constitutionally sufficient to provide notice to claimants "whose interests or whereabouts could not with due diligence be ascertained." *Mullane* v. *Cent. Hanover Bank & Trust Co.*, 399 U.S. 306, 317 (1950). Moreover, entities purporting to speak on behalf of future tort claimants participated in the Bankruptcy Court's hearing and voiced objections to the Fiat Sale, which shows that these claimants were plainly provided with adequate notice and had their concerns heard by the bankruptcy court.

Further still, as this Court held in *In re 620 Church Street Building Corp.*, 299 U.S. 24 (1936), the amount of process due to creditors of a bankrupt entity is a function of the value of their claim: "Petitioners insist that their consent to the plan of reorganization was necessary or that their claims should have been accorded 'adequate protection' . . . . Here the controlling finding is not only that there was no equity in the property above the first mortgage, but that petitioners' claims were appraised by the court as having 'no value.' There was no value to be protected [and] petitioners have not shown injury." *Id.* at 27.[*] As with any unsecured

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[*] As the Second Circuit noted in *In re Hotel Governor Clinton, Inc.*, 96 F.2d 30, 32 (2d Cir. 1938), "[t]here is an obvious distinction between depriving a lienor of the right to foreclose a security without giving him equivalent value . . . and refusing

creditor of Chrysler, the future tort claimants have no realistic prospect of recovering anything on their claims. The unfortunate but unavoidable fact is that future tort claimants who will have claims against the Debtors based on vehicles manufactured by Chrysler simply have no value to be protected.

Accordingly, just as with the Funds, because the price paid by New CarCo Acquisition for the Fiat Sale exceeds Chrysler's liquidation value, creditors stand to gain more from the Fiat Sale than any other viable alternative. For both past and future tort claimants, their claims are valueless under either scenario. Accordingly, the "irreparable harm" that they claim will ensue in the absence of a stay is entirely the product of the economic collapse of Chrysler. It has nothing to do with the Fiat Sale or the Bankruptcy Court order approving it. The tort claimants' application for a stay should therefore be denied.

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him foreclosure when the lien is concededly worthless."

CONCLUSION

The applications for a stay should be denied.

Respectfully submitted.

/ s / Thomas F. Cullen

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Dated: June 7, 2009